Comments of the National Railway Labor Conference
Regarding the National Mediation Board's Proposed Modifications to
Decertification Procedures

Docket No. C-7198
84 Fed. Reg. 612, RIN 3140-AA01

March 29, 2019

Introduction

The National Railway Labor Conference ("NRLC") respectfully submits these comments to the National Mediation Board ("NMB" or "Board") in response to the Board's Notice of Proposed Rulemaking and Request for Comments ("NPRM") regarding the process by which employees may decertify representatives under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* The NRLC represents the nation's Class I freight railroads, including BNSF Railway, CSX Transportation, Inc., Grand Trunk Railway (Canadian National), The Kansas City Southern Railway, Norfolk Southern Railway, Soo Line Railroad (Canadian Pacific), and Union Pacific Railroad.

The NRLC supports the Board's proposal to modify the current "straw man" decertification procedure to create a simpler and more direct process, similar to the rule that applies under the National Labor Relations Act ("NLRA"). The Board's proposal is modest and sensible and strikes the proper balance between stability of labor relations – which is critical to the railroads – and the statutory right of employees to "determine who shall be the representative of the craft or class." 45 U.S.C. § 152 Fourth. The new rule principally streamlines the unnecessarily complicated process that employees currently must follow in the relatively rare situations where they seek to decertify. The NRLC is not aware of any evidence that this modification would result in a meaningful increase in decertification campaigns, or otherwise threaten to undermine the long-standing and productive relationships between the major railroads and the unions that represent their employees. If anything, the proposed rule strengthens an incumbent union by confirming that the union continues to enjoy the support of a majority of employees without facing an unnecessarily complicated decertification process.

The Board's Existing Decertification Process

As the Board notes in the NPRM, employees governed by the RLA have the right to decide whether they wish to be represented, even if the employees previously had made the decision to choose collective representation. 84 Fed. Reg. at 612 (citing Bhd. of Railway and Steamship Clerks v. Ass'n for the Benefit of Non-Contract Employees, 380 U.S. 650, 670 (1965), Int'l Bhd. of Teamsters v. Bhd. of Railway, Airline and Steamship Clerks, 402 F.2d 196, 202 (D.C. Cir. 1988), and Russell v. National Mediation Board, 714 F.2d 1332 (1983)). To date, however, the Board has not adopted a direct decertification election process. Instead, employees

seeking decertification must use the "straw man" procedure, which the Board accurately describes as a "more convoluted path to an election." 84 Fed. Reg. at 612.

In 2010, the Board added a "no representative" option to the ballot, and decided that elections would be determined by a majority of the votes cast. Many of those who opposed that rule change (including the NRLC) observed that the rationale offered by the unions for the change – that it would allow the Board to more easily or accurately determine the wishes of the employees – would apply equally to adoption of an express decertification rule. Nevertheless, the Board declined to change the decertification procedures at that time.

Accordingly, under the current rules, employees wishing to decertify still must find a "straw man" to run against the existing union representative. While the "straw man" process has always been available, it has rarely been invoked by employees of Class I railroads to decertify their existing representative. As far as the NLRC is aware, there has not been a decertification election involving more than a half dozen Class I railroad employees at any point during the last 25 years.

The Board's Proposed Change to the Decertification Procedure is Sensible, Fair, and Incremental

The NPRM correctly notes that the courts and the Board "have recognized that inherent in the right to representation is the right to be unrepresented." 84 Fed. Reg. at 613. In recognition of that right, the Board proposes to "simplify the decertification process and put decertification on an equal footing with certification." Id. Rather than the relatively cumbersome "straw man" process – which requires the manufacture of what amounts to a fictional representative – the new rule would allow employees to submit authorization cards stating that they no longer wish to be represented. Id.

The Board's proposed adoption of a direct decertification process is entirely sensible. There is no logical justification for requiring employees to promote an imaginary candidate who exists only in order to disclaim representation after the election. During the 2010 rule-making, air and rail transportation unions repeatedly claimed the previous election rules – by requiring a quorum and counting a non-response as a "no" vote – were contrary to voter expectations and to "basic notions of democracy." Comments of Transportation Trades Department, AFL-CIO, NMB Docket No. C-6964 at 20. The same can be said of the straw man rule. When American voters in other contexts wish to change the status quo, they are not asked to vote for a fictional candidate whose only purpose is to step aside upon victory. Instead, they vote for the result they actually want. For example, under local government election law, municipal residents often have the right to disincorporate an existing municipality. An election in that context is a choice between the existing government and abolition – there is never any "straw man" municipality on the ballot. See, e.g., Pennsylvania Law 246, No. 47, Subchapter C (2014, as amended). The same is true under the NLRA, and the same should be true under the RLA.

The Board's proposal is also modest in scope. There is, of course, already a decertification mechanism under the RLA. Thus, any suggestion that the Board is contemplating a significant or unprecedented change in representation procedure is hyperbole. The change

under consideration is a minor, incremental adjustment that will merely make the existing procedure clearer and simpler.

As the NRLC emphasized in its comments to the Board during the 2009-2010 rulemaking, the railroads greatly value stability in labor representation. See NRLC Comments, NMB Docket No. C-6964 at 10. We noted that our "collective bargaining relationships have been maintained for decades," and that "[t]hese long-term relationships have proven enormously effective in collective bargaining, resulting in voluntary agreements in all but a handful of cases in the last quarter-century." Id. That remains true today, and there is no indication that the proposed rule under consideration would have any adverse consequences in that regard. Decertification elections on the large Class I carriers have been rare, to say the least. Any suggestion that the contemplated changes to the current rules will generate a massive upsurge in decertification campaigns is, at best, speculative.

Conclusion

For all of the reasons set forth above, the NRLC supports the Board's proposal to simplify the procedures for decertification.

Respectfully submitted,

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